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In The

Supreme Court of the United States

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fifth District Of Texas At Dallas

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE C. CHAPMAN
SCOTT P. STOLLEY
THOMPSON & KNIGHT L.L.P.
1700 Pacific Avenue
Suite 3300
Dallas, Texas 75201-4656
(214) 969-1700

DEBORA B. ALSUP*
THOMPSON & KNIGHT L.L.P.
98 San Jacinto Boulevard
Suite 1200
Austin, Texas 78701-4081
(512) 469-6114

**Counsel of Record*

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Dallas County Medical Society and the Texas Medical Association, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Court of Appeals for the Fifth District of Texas in *Dallas County Medical Society and Texas Medical Association v. Ubiñas-Brache, M.D.*, 2001 Tex. App. LEXIS 818 (Tex. App. – Dallas Feb. 7, 2001, pet. denied).

STATEMENT OF THE CASE

Petitioner, Dr. Ubiñas, seeks review of a state court judgment by petition for writ of certiorari. However, no federal questions were presented in the trial court, nor decided by the Dallas Court of Appeals.[1] Dr. Ubiñas brought suit in state court, alleging breach of contract and violations of common law rights to due process. He complained that the Dallas County Medical Society and the Texas Medical Association had a duty under their bylaws and Hearings Procedural Manual, to provide "a fair and good faith proceeding" and "fundamental fairness" in conducting a disciplinary proceeding against him, and that they breached their agreement to do so.

[1] In this brief in opposition, Respondents will demonstrate, in accordance with *Adams v. Robertson*, 520 U.S. 83, 91-92 (1997), and Supreme Court Rule 15.2, that the Questions Presented have not been preserved. Respondents reserve the right to respond on the merits should the petition for writ of certiorari be granted.

(Tr. 41, Pet. App. 6a) He also complained that the disciplinary hearing did not comport with procedural due process under the Texas Constitution, TEX. CONST. art. I, § 19. (Tr. 44, Pet. App. 6a) There were no federal questions presented by Plaintiff's Second Amended Petition. (Tr. 34-51)

Based on the jury's breach of contract finding, the trial court issued an injunction that Dr. Ubiñas should not be expelled from the Dallas County Medical Society and the Texas Medical Association. (Pet. App. 26a) The medical society and association appealed to the Fifth District Court of Appeals at Dallas, arguing primarily that no breach of contract claim was available because a state statutory scheme grants immunity from suit unless there was proof of malice in the conduct of the disciplinary proceedings. In February 2001, the Dallas Court of Appeals reversed the trial court's judgment, holding that the Texas Medical Practice Act, TEX. REV. CIV. STAT. ANN. art. 4495b, §§ 5.06(l), (m)[2] provides immunity for medical peer review unless there is a finding that the peer review committee acted with malice. (Pet. App. 13a) Because Dr. Ubiñas failed to obtain an affirmative finding of malice – the threshold standard to state a cause of action – the court held that he waived recovery. (Pet. App. 13a). The court of appeals further found that the malice standard did not violate the Open Courts Provision of the Texas Constitution, TEX. CONST art. I, § 13. (Pet. App. 18a) There

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[2] This statute has not been simply repealed, as indicated by Petitioner (Pet. at 2). Rather, it was recodified at TEX. OCC. CODE ANN. § 160.010(b) (Vernon 2002).

was no ruling by the state court of appeals on any federal question.

After the court of appeals denied Dr. Ubiñas's motion for rehearing, he then appealed to the Texas Supreme Court by petition for review. He globally raised impairment of contract and due process complaints under the United States Constitution, but never argued the particularized questions presented here under those constitutional provisions. The Texas Supreme Court declined to review the judgment of the Dallas Court of Appeals on August 23, 2001, and denied rehearing on October 18, 2001. (Pet. App. 20a, 31a)

REASONS FOR DENYING THE WRIT

The Questions Presented in the Petition for Writ of Certiorari were neither presented, nor preserved for this Court's review. Dr. Ubiñas urges here that his claims should be analyzed under federal constitutional standards. He argues that by ruling that he did not have a contract claim against the Dallas County Medical Society, the court of appeals was "[d]isregarding this Court's holding in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) that the court must apply federal law to decide whether there is a contract under the Contract Clause . . . . " (Pet. at 11) Yet Dr. Ubiñas never even cited the *Romein* case to the court of appeals or to the Texas Supreme Court. He also argues that this Court should decide "the difficult question of when a contract right is also a property right for purposes of the Due Process Clause . . . . " (Pet. at 12) This issue likewise was not

presented or decided below. Finally, Dr. Ubiñas argues that a medical society should qualify as a state actor for purposes of the Due Process Clause (Pet. at 12), despite the fact that the trial court ruled adversely on this point and Dr. Ubiñas never challenged that ruling on appeal.

1. The claimed basis for jurisdiction is unavailable because no substantial federal question was presented or decided in the state court proceedings.

Petitioner asserts jurisdiction in this Court under 28 U.S.C. § 1257(a), the jurisdictional statute that governs this Court's review of state court judgments by certiorari. (Pet. at 1) But it is essential to jurisdiction under section 1257 that a substantial federal question was raised and preserved in the state court proceedings. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). The policy considerations underlying this jurisdictional requirement are twofold: (1) in a federal system, it is important that the state court have the first opportunity to consider the applicability of state statutes in light of a constitutional challenge, since the statute may be construed to uphold its constitutionality; and (2) even if a federal question is raised below, other independent and adequate state grounds may block its consideration. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *see also Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). This Court has repeatedly acknowledged that state courts are competent to adjudicate federal constitutional claims and should be given the first opportunity to pass on federal challenges. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980).

Section 1257 also requires that there be a final judgment or decree rendered "by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In this case, the final decision is that of the Dallas Court of Appeals because the Texas Supreme Court declined to review the case. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678, n.1 (1968). The Dallas Court of Appeals did not consider a federal constitutional challenge to the Texas Medical Practice Act, because none was presented. Furthermore, independent non-federal, statutory grounds were sufficient for resolution of this claim given the immunity provisions in the Act. Under these circumstances, United States Supreme Court review is unavailable.

2. Petitioner failed to comply with this Court's jurisdictional rules requiring him to demonstrate that a federal question was preserved.

Consistent with statutory jurisdictional requirements, this Court's Rules likewise mandate that, in an appeal from a state court, the Petitioner must demonstrate that he has preserved a substantial federal question for presentation to this Court. Rule 14.1(g)(i) requires that if review of a state court judgment is sought, the Petitioner must specify the stage of the proceedings where the federal questions sought to be reviewed were raised, demonstrate how the questions were raised and passed upon by the state trial and appellate courts, and provide pertinent quotations from the record specifically referring to where the matter appears. This is necessary "so as to show that the federal question was timely and properly

raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Rule 14.1(g)(i).

Dr. Ubiñas has generally alleged jurisdiction, but wholly failed to demonstrate how a federal question was presented and preserved in the state court proceedings. (Pet. at 1) Indeed, Dr. Ubiñas cannot make this showing because the federal questions before this Court were not raised below. None of the seventeen reply points of error that Dr. Ubiñas made in the court of appeals discuss impairment of contract under Article I, § 10 of the United States Constitution. (*See* Appellee's Reply Points reprinted at App. 1-4 herein.) Nor do the reply points reference the Due Process Clause of the Fourteenth Amendment, although Dr. Ubiñas argued this constitutional provision in his briefing. His argument below, however, was that federal due process was irrelevant: "The DCMS' [Dallas County Medical Society] arguments of due process requirements under federal and state law – including whether the DCMS is a 'state actor' – thus are irrelevant. The only 'due process' at issue is that set forth and defined in the Manual." (Appellee's Brief at 21)

In fact, in Dr. Ubiñas's Sur-Reply Brief to Appellant's Reply Brief, he conceded that the case does not concern federal constitutional issues: "The case submitted to the jury is not about violations of the Texas or United States Constitutional due process provisions – the trial court ruled that the acts of Appellants did not constitute state action." (Appellee's Sur-Reply Brief at 1) Instead, he argued that the immunity provisions of the Texas Medical Practice Act cannot bar his suit, because that would deprive him of "his valuable contract rights without recourse in the courts [which] violates the Open Courts

Provision of the Texas Constitution, as it would restrict the well-recognized common law cause of action for breach of contract." (Appellee's Sur-Reply Brief at 12) These quoted arguments demonstrate that Dr. Ubiñas was not urging constitutional violations under the United States Constitution at the Dallas Court of Appeals. Consequently, there is no ruling from that court on federal constitutional grounds. (*See* Pet. App. 1a-22a.)

After the Dallas Court of Appeals reversed the injunction granted by the trial court, Dr. Ubiñas then changed course in his motion for rehearing and argued that the ruling violated his federal due process rights and impaired his contract with the Dallas County Medical Society. He argued that: (1) the ruling violated the Open Courts Provision of the Texas Constitution and the First and Fourteenth Amendments of the United States Constitution; (2) the Contract Clause of the United States Constitution prevents state action that deprives citizens of their private contract rights; and (3) the decision violates the federal Due Process Clause and the Texas Constitutional Due Course of Law Clause. (*See* Motion for Rehearing Issues reprinted at App. 5 herein.) It is improper, however, under Texas practice, to raise new federal constitutional issues for the first time on appeal. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) ("As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal.")

Thereafter, on petition for review to the Texas Supreme Court, Dr. Ubiñas made the same complaints as in his motion for rehearing. (*See* Petition for Review Issues, reprinted at App. 6 herein.) He globally argued

that the court of appeals' application of the immunity provisions of the Texas Medical Practice Act violated the Contract Clause, U.S. CONST. art. I, § 10. He urged that the court's "interpretation of the Act renders it unconstitutional under the Contract Clause, as it applied the statute to void a contract obligation; in doing so the Court effected a change in the law that substantially impaired the contract." (Pet. for Review at 11) For support, he cited *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 250 (1978), and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). *Id.* But his Contract Clause question framed to this Court is completely different. It is whether the court of appeals incorrectly disregarded *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), because federal law must be applied to decide whether there is a contract for Contract Clause analysis. (Pet. at 11) This was never argued before, nor was the *Romein* case cited at any stage of the state proceedings. The Dallas Court of Appeals did not "disregard" *Romein* because the question of its applicability for Contract Clause analysis was never briefed. Indeed, Dr. Ubiñas now cites twenty-six additional federal cases as authority in his Petition for Certiorari that he never relied upon in the state trial and appellate courts. Only *Allied Structural Steel* and *U.S. Trust v. New Jersey* were advanced as authority below.

The due process arguments presented in the Petition for Certiorari – whether a contract right is also a property right and whether a medical society qualifies as a state actor for purposes of federal due process analysis – were likewise not presented and not preserved. Indeed, as demonstrated above, Dr. Ubiñas asserted that federal due

process was irrelevant. Under these circumstances, review by this Court should be denied.

CONCLUSION

Because the Questions Presented in the Petition for Writ of Certiorari were not preserved for this Court's review, the Dallas County Medical Society and the Texas Medical Association respectfully request that this Court deny the petition.

Respectfully submitted,

THOMPSON & KNIGHT L.L.P.

DEBORA B. ALSUP*
98 San Jacinto Boulevard, Suite 1200
Austin, Texas 78701-4081
(512) 469-6114
(512) 469-6180 Fax

GEORGE C. CHAPMAN
SCOTT P. STOLLEY
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4656
(214) 969-1700
(214) 969-1751 Fax

**Counsel of Record*

Counsel for Respondents
Dallas County Medical Society
and Texas Medical Association

February 25, 2002

APPENDIX

REPLY POINTS IN DR. UBIÑAS'S APPELLEE'S BRIEF TO COURT OF APPEALS FOR FIFTH DISTRICT OF TEXAS AT DALLAS:

APPELLEE'S REPLY POINTS

The First Issue: The DCMS' Breach of Its Covenants and Duties

Reply Point One

The trial court did not err by overruling the DCMS' and the TMA's requests for the trial court to rule as a matter of law that Dr. Ubiñas received fundamental fairness and a fair and good faith proceeding. (In response to Appellants' First Point of Error)

Reply Point Two

The evidence is legally and factually sufficient to support the jury's findings that the DCMS and the TMA failed to provide Dr. Ubiñas fundamental fairness and a fair and good faith proceeding. (In response to Appellants' Second Point of Error)

The Second Issue: The Trial Court Did Not Abuse Its Discretion in Conducting the Trial Proceedings

Reply Point Three

The trial court did not err and acted within its discretion in excluding a portion of the testimony of the DCMS' and the TMA's expert Jerry Bell. (In response to Appellants' Third Point of Error)

Reply Point Four

The trial court did not err and acted within its discretion in excluding the testimony of the

DCMS' and the TMA's fact witness George Toledo. (In Response to Appellants' Eleventh Point of Error)

The Third Issue: The Trial Court Correctly Ruled on the DCMS' Requested Issues of Waiver and Estoppel

Reply Point Five

The evidence does not conclusively establish that Dr. Ubiñas is estopped to complain about the peer-review proceeding, and the jury's findings of no estoppel are not against the great weight and preponderance of the evidence. (In response to Appellants' Fourth Point of Error)

Reply Point Six

The trial court did not err but properly refused the DCMS' and the TMA's requested instruction on waiver. (In response to Appellants' Fifth Point of Error)

The Fourth Issue: The Peer-Review Immunity Provisions Do Not Apply

Reply Point Seven

The trial court did not err by overruling the DCMS' and TMA's requests for the court to rule that as a matter of law the DCMS and the TMA are immune under the Texas Medical Practice Act. (In response to Appellants' Sixth Point of Error)

Reply Point Eight

The trial court did not err by refusing to submit the DCMS' and the TMA's question inquiring whether the DCMS and the TMA acted with malice. (In response to Appellants' Seventh Point of Error)

Reply Point Nine

The trial court did not err by overruling the DCMS' and the TMA's requests for the court to rule that as a matter of law the DCMS and the TMA complied with the Health Care Quality Improvement Act. (In response to Appellants' Fourteenth Point of Error)

Reply Point Ten

The trial court did not err by refusing to submit the DCMS' and TMA's jury question inquiring whether the DCMS and the TMA failed to comply with the Health Care Quality Improvement Act. (In response to Appellants' Fifteenth Point of Error)

The Fifth Issue: The Trial Court Did Not Abuse Its Discretion by Granting Injunctive Relief

Reply Point Eleven

The trial court did not err by overruling the DCMS' and the TMA's requests for the court to rule that as a matter of law Dr. Ubiñas will not suffer immediate and irreparable harm. (In response to Appellants' Eighth Point of Error)

Reply Point Twelve

The evidence is legally and factually sufficient to support the jury's findings that Dr. Ubiñas will suffer immediate and irreparable harm. (In response to Appellants' Ninth Point of Error)

Reply Point Thirteen

The trial court did not err or abuse its discretion in granting injunctive relief. (In response to Appellants' Tenth Point of Error)

Reply Point Fourteen

The trial Court did not err by entering an overly broad injunction. (In response to Appellants' Twelfth Point of Error)

The Sixth Issue: The DCMS Is Not Entitled to Attorney's Fees

Reply Point Fifteen

The trial court did not err or abuse its discretion by refusing the DCMS' and the TMA's requests for attorney's fees. (In response to Appellants' Thirteenth Point of Error)

Reply Point Sixteen

The trial court did not err by refusing the DCMS' and the TMA's requests for the court to rule that as a matter of law Dr. Ubiñas lawsuit was frivolous, unreasonable, without foundation, or brought in bad faith. (In response to Appellants' Sixteenth Point of Error)

Reply Point Seventeen

The trial court did not err by refusing the DCMS' and the TMA's requested jury question inquiring whether Dr. Ubiñas's lawsuit was frivolous, unreasonable, without foundation, or brought in bad faith. (In response to Appellant's Seventh Point of Error)

Appellee's Cross-Points: Dr. Ubiñas Is Entitled to Recover Attorney's Fees

Cross-Point One

The trial court erred or abused its discretion in denying Dr. Ubiñas claim for attorney's fees under Chapter 37 of the Declaratory Judgment Act. (Final Judgment, Tr. 179-80)

Cross-Point Two

The trial court erred or abused its discretion by denying Dr. Ubiñas's requests for the court to determine the amount of attorney's fees to which Dr. Ubiñas is entitled. (Final Judgment, Tr. 179-80)

ISSUES PRESENTED IN DR. UBIÑAS'S MOTION FOR REHEARING:

Issues Presented for Review

Issue 1: Does this Court's application of the Texas Medical Practice Act ("Act") to deprive Dr. Ubiñas of his claim for breach of contract violate the First and Fourteenth Amendments to the United States Constitution and the open courts provision of the Texas Constitution?

Issue 2: Does this Court's application of the Act to deprive Dr. Ubiñas of his contract rights violate the contract clause of the United States Constitution?

Issue 3: Does this Court's application of the Act to deprive Dr. Ubiñas of property and liberty rights without just compensation violate the due process clause of the United States Constitution and the due course of law clause of the Texas Constitution?

Issue 4: Did this Court err by interpreting the Act to provide Appellants with absolute immunity, absent a showing of malice?

Issue 5: Did this Court err by holding that the Act precludes injunctive relief when an association violates its bylaws?

ISSUES PRESENTED IN DR. UBIÑAS'S PETITION FOR REVIEW TO THE TEXAS SUPREME COURT:

Issues Presented for Review

Issue 1: Does the Act negate a medical association's agreement with its members to provide them with rights in a peer review proceeding that exceed the minimal statutory rights granted under the Act?

Issue 2: If so, is the Act unconstitutional under the open courts provisions of the Texas and United States Constitutions?

Issue 3: Did the Court of Appeals' application of the Act violate the contract clause of the United States Constitution?

Issue 4: Did the Court of Appeals' application of the Act violate the due process and due course of law provisions of the United States and Texas Constitutions?

Issue 5: Is a medical association entitled to absolute immunity from suit, including a suit for injunctive relief based on its breach of contract, even if the association fails to plead such immunity as an affirmative defense?

Issue 6: Is a medical association that is found by a jury to have violated its contract with its physician member entitled to recover its attorney's fees under the Act?